Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

SALVATORE J. PRESUTTI,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
As receiver for the Bank of Hartford,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In this case, a jury verdict was entered for Petitioner on June 6, 2000. A judgment was entered for him on June 22, 2000. No appeal of the judgment was ever filed. The Judge entered an amended judgment on January 10, 2001, almost six months after the judgment, in response to a motion by respondent for judgment as a matter of law made prior to the judgment, and stated in an endorsement order that he did not do so in reliance on Rule 60 of the Federal Rules of Civil Procedure.

The question presented is whether, if the ten day period set forth in Rule 50 for renewing a request for judgment as a matter of law and in Rule 59 for a new trial under the Federal Rules of Civil Procedure, and the 30 day period for appeal of a judgment set forth in Rule 4(a)(1), have passed without a motion under Rule 50 or 59 or an appeal, the judgment is final.

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

Neither the Judgment, dated June 22, 2000 or the amended Judgment, dated January 10, 2001 of the district court is otherwise published, and the opinion of the court of appeals filed on December 20, 2001 is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on December 20, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1). A United States Court of Appeals has decided an important question of federal law relating to the finality of judgments and the meaning of Rule 50 of the Federal Rules of Civil Procedure in a way that conflicts with a relevant decision of this Court.

RULES INVOLVED

The provisions of Sections 50, 59 and 60 of the Federal Rules of Civil Procedure are set forth at Appendix F.

STATEMENT OF THE CASE

The case was filed against the Bank of Hartford in Connecticut Superior Court. The complaint was based on an incident at a building on which the Bank of Hartford held a mortgage. The gravamen of the complaint was that agents of the Bank of Hartford activated a monitoring system owned by petitioner in that building which caused the petitioner to be confronted by a police officer in combat position with a loaded pistol. The Bank of Hartford failed, and the FDIC removed the case to federal district court.

A jury trial was held, and on the jury found for petitioner on two counts. On June 15, 2000 the FDIC renewed an earlier motion, asking for judgment notwithstanding the verdict. On June 22, 2000 a judgment was entered on the two counts on

which the jury found for the petitioner. On July 4, petitioner Presutti filed a motion requesting counsel fees. On July 25, 2000, long after any request under Rule 50 or appeal of the verdict should have been filed, the FDIC moved for additional time to respond to the motion for counsel fees "until 20 days following the decision of the court on the defendant's Post Trial Rule Motion." Presutti objected to the FDIC's motion, noting that the time for appeal had passed and stating that "The judgment, therefore, is final."

On January 3, 2001, the district court issued an order vacating the judgment entered on June 22, 2000, and on January 10, 2001, issued an amended judgment, which denied any recovery to petitioner. On January 22, 2001, six months to the day from the date the original judgment was entered, the district judge denied a motion of petitioner to alter or amend the judgment and stated that he did not rely on Rule 60 to amend the judgment. Rule 60 could have been used to amend the initial judgment if it had been by clerical error or similar mistake, but it was not.

Petitioner had a judgment in his favor for six months, and then lost it. He lost it even when there was no appeal of the judgment! The circuit court said that the motion for judgment notwithstanding the verdict was a sufficient appeal because it was filed before the entry of the judgment, citing the Advisory Committee Notes for the 1995 amendments to the Federal Rules of Civil Procedure, that "The phrase 'no later than' is used — rather than 'within' — to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk." But that relates to a "post-judgment" motion, not a motion when there is no judgment. There was no "post-judgment" motion, because at the time the motion was made, there was no judgment.

If a judge gives an Order, as the district judge did in his Order of January 3, 2001, stating that he *will* give judgment in a certain manner, or if he even states he will from the bench,

then the scope of the judgment is known and an appeal can be filed earlier. But when he has given no indication of what his judgment will be, it is fantasy to characterize it as a "post-judgment" motion. This is a perversion of the Federal Rules of Civil Procedure.

In *Johnson, Administratrix v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 48 (1952), this Court stated:

> On several recent occasions we have considered Rule 50(b). We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment. [at 50]
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> . . .
>
> Rule 50(b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts. [at 52]
>
> . . .
>
> Rule 50(b) as written and as construed by us is not difficult to understand or to observe. [at 53]

The second circuit has also ignored its own prior decisions. In *Fruit of the Loom, Inc. v. American Marketing Enterprises, Inc.*, 192 F.3d 73 (2d Cir. 1999), defendant American Marketing Enterprises ("AME") served a motion on plaintiff Fruit of the Loom within 10 days, but received permission from the district judge to file it after the 10 day period. The Court decided that the Judge lacked the authority to permit the filing of a 50(b) motion "outside of the 10-day window for filing post-judgment motions, dismissed the appeal for lack of jurisdiction, and gave a general notice to the bar, stating at 74:

> We write to remind the bar that the individual practice rules of a district Judge must be read in

> conjunction with the Federal Rules of Civil Procedure and that the Federal Rules and their jurisdictional filing dates supersede any seemingly contrary district court practice rule.

In the following year, the second circuit decided *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224 (2d Cir. 2000). It dismissed defendant's appeal from a final judgment because defendant did not file its motion for judgment as a matter of law within the ten day time period required under Rule 50(b). The circuit court determined that the district court lacked the power to extend the time to file its post-trial motion, and the district court had no power to modify the trial verdict. However, it decided that, while the district court lacked jurisdiction to do so, the circuit court could review the sufficiency of evidence, since the plaintiff appellee and cross-appellant failed to raise the timeliness issue in the district court or on appeal, and therefore waived any objection.

The instant case differs from *Weissman v. Dawn Joy Fashions, Inc. supra*, in that Presutti never waived the lack of timeliness, and in fact raised it in each subsequent filing with the district court.

This case underlines the reason for the rule. For six months, Presutti had a judgment creditors could rely on, which gave him some compensation and made him feel vindicated. Then it was taken away.

After the 10 day period had expired, Mr. Presutti's attorney told him the judgment was final. The fact that his attorney thought so is indicated by the fact that on June 18, 2000 he moved to request additional time to respond to defendant's motion for directed verdict. When he received the June 22, 2000 judgment, he ceased researching the question, and 10 days thereafter, considered it settled and moved for counsel fees pursuant to the judgment on July 4, 2000. In every motion after that, until the Order of January 3, 2001, he argued only as to the failure of defendant to file within the ten day period. Only after

the January 3 Order, which vacated the original judgment, did he address the questions raised in the defendant's June 15, 2000 memorandum, and then inadequately, in an attempt to obtain oral argument on the point to find out why the Order was issued.

Rule 50 of the Federal Rules of Civil Procedure was adopted for uniformity. In *Rezzonico and Rezzonico v. H & R Block, Inc. et al.*, 182 F.3d 144 (2d Cir. 1999), involving the 30 day time limit for filing an appeal pursuant to Fed. R. App. P. 4(a)(1), the second circuit stated at 150:

> Rule 4(a), which sets out the 30-day time limit within which this appeal had to have been taken, serves the salutary purpose of fixing the point at which litigation shall end — if an appeal has not been taken before that date — thereby relieving prospective appellees of the demands appellant is making against them.

Rule 50 and Rule 4(a) are the only way to know that the litigation is done. The case is at rest, and the judgment is final, once the relevant time period passes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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